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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

- - - - - x  
In re: : Chapter 11  
:   
CIRCUIT CITY STORES, INC., : Case No. 08-35653 (KRH)  
et al., :   
:   
Debtors. : Jointly Administered  
- - - - - x

**DEBTORS' SUPPLEMENTAL OBJECTION TO CLAIM 1053  
OF GRAPHIC COMMUNICATIONS**

The debtors and debtors in possession in the  
above-captioned cases (collectively, the "Debtors")<sup>1</sup>

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<sup>1</sup> The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN, Inc. (0875), Ventoux International, Inc. (1838), Circuit City  
(cont'd)

hereby file this supplemental objection (the "Supplemental Objection") to claim number 1053 (the "Claim") filed by Graphic Communications ("Graphic"), and move this Court, pursuant to sections 105 and 503(b)(9) of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (as amended, the "Bankruptcy Code"), Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Local Bankruptcy Rule 3007-1 for entry of an order, the proposed form of which is attached hereto, reclassifying such claim to a general unsecured non-priority claim. In support of this Supplemental Objection, the rely upon and hereby incorporate by reference the Stipulated Facts With Respect To Debtors' Objection To Claim Number 1053 (Docket No. 7963) (the "Stipulated Facts").<sup>2</sup> In further

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*(cont'd from previous page)*

Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC Distribution Company of Virginia, Inc. (2821), Circuit City Properties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc. (6796), Sky Venture Corp. (0311), PRAHS, INC. (n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courchevel, LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512). The address for Circuit City Stores West Coast, Inc. is 9250 Sheridan Boulevard, Westminster, Colorado 80031. For all other Debtors, the address is 4951 Lake Brook Drive, Glen Allen, VA 23060.

<sup>2</sup> Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Stipulated Facts.

support of this Supplemental Objection, the Debtors respectfully state as follows:

**STIPULATED FACTS**

1. On July 2, 2010, the Debtors and Graphic filed the Stipulated Facts. The Stipulated Facts contain relevant and undisputed facts and documents with respect to this Supplemental Objection. By agreement between the Debtors and Graphic, the Stipulated Facts are admitted and do not require any proof by either party.

**OBJECTION**

2. By this Supplemental Objection, the Debtors seek entry of an order reclassifying the Claim to a general unsecured, non-priority claim.

**BASIS FOR OBJECTION**

3. Currently, the Debtors are engaged in a thorough review of all claims filed against their estates, including administrative expense claims, to determine the validity of such claims. As part of this process, the Debtors are diligently reviewing claims filed pursuant to Bankruptcy Code section 503(b)(9).

4. Based on the Stipulated Facts, the Debtors have determined that the Claim does not satisfy the requirements of Bankruptcy Code section 503(b)(9). Specifically, Graphic has failed to meet its burden under section 503(b)(9) to demonstrate that the Invoices were for "goods" that were "received" by the Debtors during the twenty-day period prior to the Petition Date. Therefore, Graphic has failed to establish a valid section 503(b)(9) claim.

#### **APPLICABLE AUTHORITY**

**I. GRAPHIC HAS THE BURDEN TO DEMONSTRATE THAT IT HAS SATISFIED ALL ELEMENTS OF ITS ALLEGED SECTION 503(B)(9) CLAIM.**

5. Courts in the Fourth Circuit have repeatedly held that the claimant has the burden of proof on all elements of an administrative expense claim. See, e.g., Ford Motor Credit Co. v. Dobbins, 35 F.3d 860, 866 (4th Cir. 1994) (quoting In re Mid Region Petroleum, Inc., 1 F.3d 1130, 1132 (10th Cir. 1993)) ("the party claiming entitlement to administrative expense priority [under § 503(b)] has the burden of proof"); see also In re Wetco Rest. Group, LLC, No. 07-51169, 2008 WL 1848779, \*4 (Bankr. W.D. La. Apr. 23,

2008) (the claimant has the "burden to establish that the value of the 20-Day Goods qualifies for administrative expense treatment under section 503(b)(9)").

6. In evaluating administrative expense requests, courts should remain mindful that "[t]he presumption in bankruptcy cases is that the debtor's limited resources will be equally distributed among the creditors." Ford Motor Credit Co. v. Dobbins, 35 F.3d at 865 (quoting In re James B. Downing & Co., 94 B.R. 515, 519 (Bankr. N.D. Ill. 1988)); see also City of White Plains v. A&S Galleria Real Estate, Inc. (In re Federated Dep't Stores, Inc.), 270 F.3d 994, 1000 (6th Cir. 2001). Thus, this Court should interpret section 503(b)(9) narrowly and in accordance with its plain meaning. See Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000) ("Congress says in a statute what it means and means in a statute what it says there." (internal quotations omitted)); In re NVR, LP, 189 F.3d 442, 457 (4th Cir. 1999) (holding that the Bankruptcy Code must be interpreted in accordance with its plain meaning using the ordinary understanding of

words); In re Amireh, No. 05-12358-RGM, 2008 WL 52706, \*4 (Bankr. E.D. Va. Jan. 2, 2008) ("The court will not expand the reach of the statute beyond the language chosen by Congress.").

7. Here, Graphic contends that the Claim is entitled to administrative expense priority under Bankruptcy Code section 503(b)(9), which provides:

(b) After notice and a hearing, there shall be allowed administrative expenses, . . . including . . .

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

11 U.S.C. § 503(b)(9) (emphasis added). Therefore, in order to meet its burden of proof with respect to the Claim, Graphic must establish, among other things, that the Invoices upon which the Claim is based are for "goods" that were "received" by the Debtors during the 20 day period prior to the Petition Date.

8. Based on the Stipulated Facts and as demonstrated below, Graphic has not met and cannot meet its burden.

**II. GRAPHIC DID NOT PROVIDE "GOODS" TO THE DEBTORS.**

9. As discussed above, Bankruptcy Code section 503(b)(9) provides administrative expense priority treatment to claims for "the value of any goods received by the debtor within 20 days before the date of commencement of a case . . . ." 11 U.S.C. § 503(b)(9) (emphasis added).

10. While the Bankruptcy Code does not define the term "goods," this Court has held that "the definition of 'goods' in the Uniform Commercial Code (the 'UCC') should be employed in fashioning a federal definition for that term in § 503(b)(9)." In re Circuit City Stores, Inc., 416 B.R. 531, 532 (Bankr. E.D. Va. 2009). In that regard, the UCC defines "goods" as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid . . . ." Id. at 535 (quoting UCC § 2-105).

11. This Court has also held that the "predominate purpose test" should be used when deciding "whether a claim involves the selling of goods and is,

therefore, entitled to administrative priority under § 503(b)(9) of the Bankruptcy Code." Id. at 532. The predominant purpose test asks whether the contract's "predominant factor, [] thrust, [and] purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved." Id. at 537 (quoting Princess Cruises, Inc. v. Gen. Elec. Co., 143 F.3d 828, 833 (4th Cir. 1998)).

12. For purposes of the predominant purpose test, "[t]he Fourth Circuit has deemed the following factors significant in determining the nature of the contract: (1) the language of the contract, (2) the nature of the business of the supplier, and (3) the intrinsic worth of the materials." Princess Cruises, Inc., 143 F.3d at 833 (citing Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456, 460 (4th Cir. 1983)).

13. Here, the Master Services Agreement ("MSA") and the relevant Statements of Work (each an "SOW") are agreements for which the "predominant factor, [] thrust, [and] purpose, reasonably stated, is the



rendition of service, with goods incidentally involved." See, e.g., Mail Concepts Inc. v. Foote and Davies Inc., 409 S.E.2d 567 (Ga. Ct. Appl. 1991)(holding contract for imprinting, packaging, labeling and shipping of magazines was contract for services). But, see, e.g., Erin Printing and Promotional Mktg, Inc. v. Convum, LLC, No. M2003-01449-COA-R3-CV, 2005 WL 366895 at \*3 (Tenn. Ct. App. 2005) (concluding that a contract for printing catalogues was contract for goods). Indeed, each Princess Cruises factor weighs heavily in favor of concluding that the MSA and SOWs 1 and 2 were contracts for the rendition of services, i.e., printing, with goods, i.e., Cartons and Bundles, incidentally involved.

14. First, the language of the MSA and SOWs 1 and 2 provides strong evidence that they were for services. Specifically, the MSA expressly uses the term "Services" to describe the nature of the work Circuit City contracted with Graphic to provide. In that regard, "Services" is defined as "[a]ny reasonable effort expended by the Parties or their Personnel to perform the work described in a SOW." Stipulated Facts

¶ 30.

15. Moreover, SOW 1 and SOW 2 described the "Services" as including service-based work such as coordinating, reporting on, analyzing and monitoring printing and delivery of the Newspaper Inserts. See Stipulated Facts ¶¶ 35-37. Specifically, under SOW 1 "Graphic agreed to manage 'Circuit City's paper needs as it related to inserts/catalogs/direct mail and any other of Circuit City's paper needs that might develop.'" Stipulated Facts ¶ 34. Further, under SOW 1, "Graphic agreed to review requirements as received from Circuit City, conduct reporting and analysis (with regard to consumption, waste, etc.), coordinate printing services with Circuit City/Quebecor World, coordinate insert logistics with Circuit City and third parties, ensure adequate supply of desired stock on hand, monitor printers, help monitor timely delivery of inserts and help with store ad distribution." Stipulated Facts ¶ 35. Similarly, under SOW 2, Graphic agreed to "provide paper, print, and logistical services in support of Circuit City's advertising circular program in Puerto Rico." Stipulated Facts ¶ 36.

16. Second, the nature of Graphic's business is the provision of services. Indeed, this is exactly how Graphic markets itself. See Graphic Communications Website, <http://www.graphiccommunications.com/paper/> ("One of the reasons we've become the international leader in paper service is because we work intensely to keep our suppliers as happy as our customers" (emphasis added))(last visited July 2, 2010); see also Stipulated Facts at ¶ 7 ("Graphic sold and serviced annually more than 1 million tons of paper and more than \$100 million in printing, with combined sales in excess of \$1 billion.").

17. Third, the intrinsic worth of the materials supplied by Graphic under the MSA and SOWs 1 and 2 for purposes of printing the Newspaper Inserts is small in comparison to the printing charges. Indeed, the charges for printing services total \$173,527.44. See Stipulated Facts ¶¶ 43, 44, 45, 47. In contrast, the only materials identified on the Invoices -- Cartons and Bundles -- make up a mere \$1,668.30 or approximately 1% of the Claim. See Stipulated Facts at ¶¶ 46, 48. Moreover, the single largest and most important material

-- the paper -- was separately (1) billed by Graphic, (2) invoiced to the Debtors under SOW 3, and (3) paid by the Debtors. Stipulated Facts ¶¶ 37, 39. Thus, amounts due on account of the paper purchased were not included in the Claim. Stipulated Facts ¶ 39.

18. For these reasons, it is clear that the predominant purpose of the MSA and SOWs 1 and 2 was the rendition of services rather than the sale of goods.

19. Accordingly, Graphic has failed to meet its burden, and the Claim should be reclassified to a general unsecured non-priority claim.

**III. ASSUMING, ARGUENDO, GRAPHIC SOLD "GOODS" TO THE DEBTORS, SUCH GOODS WERE NOT "RECEIVED" BY THE DEBTORS.**

20. Even assuming, arguendo, that Graphic sold the Newspaper Inserts, as "goods", to the Debtors, the Newspaper Inserts were not "received" by the Debtors within 20 days of the Petition Date. Rather, the Newspaper Inserts were "received" by Eleets or Vertis and subsequently the actual newspaper companies that distributed the Newspaper Inserts. Stipulated Facts ¶¶ 32, 51. Consequently, the Claim should be reclassified to a general unsecured, non-priority claim.

21. As this Court has previously held, "received" in Bankruptcy Code section 503(b)(9) "means having taken into 'physical possession[,]' " which is derived from the definition of "receipt" in the UCC. See In re Circuit City Stores, Inc., No. 08-35653, 2010 WL 1451338 at \*4 (Bankr. E.D. Va. Apr. 8, 2010) ("the Court holds that 'received' for the purposes of § 503(b)(9) means having taken into 'physical possession.'"); U.C.C. § 2-103(1)("'Receipt of goods' means taking physical possession of goods."). Here, the Newspaper Inserts bypassed the Debtors and went directly from Graphic to Eleets or Vertis, each a common carrier, for delivery to the newspaper companies. Stipulated Facts ¶¶ 32, 51. Therefore, the Debtors never took actual physical possession of the Newspaper Inserts.

22. Moreover, neither Eleets nor Vertis, as common carriers, were the Debtors' agent or bailee. See, e.g., Montello Oil Corp. v. Marin Motor Oil, Inc. (In re Marin Motor Oil, Inc.), 740 F.2d 220, 225 (3d Cir. 1984) (noting that under the UCC, "goods given by a seller to a common carrier for delivery to a buyer [are] . . . in the possession of the common carrier not the

buyer."); Trico Steel Co., L.L.C. v. Cargill Inc. (In re Trico Steel Co., L.L.C.), 302 B.R. 489, 493 (D. Del. 2003) (same). Consequently, the Debtors did not constructively "receive" the Newspaper Inserts when Eleets or Vertis took actual physical possession of the Newspaper Inserts. Indeed, Circuit City did not have a contract with Vertis and was not in any way associated with Vertis or its agents. Stipulated Facts ¶ 32. Rather, Graphic contracted with Vertis for delivery of Newspaper Inserts to Puerto Rico. Stipulated Facts ¶ 32.

23. Accordingly, Graphic has failed to meet its burden, and the Claim should be reclassified to a general unsecured non-priority claim.

#### **RESERVATION OF RIGHTS**

24. At this time, the Debtors have not completed their review of the validity of all claims/expenses filed against their estates, including the Claim. To that end, the Debtors reserve the right to further object to the Claim and any and all claims, whether or not the subject of this Supplemental Objection, for allowance, voting, and/or distribution purposes, and on any other grounds. Furthermore, the

Debtors reserve the right to modify, supplement and/or amend this Supplemental Objection as it pertains to any claim of Graphic.

**NOTICE**

25. Notice of this Supplemental Objection has been provided to Graphic and to parties-in-interest in accordance with the Court's Supplemental Order Pursuant to Bankruptcy Code Sections 102 and 105, Bankruptcy Rules 2002 and 9007, and Local Bankruptcy Rules 2002-1 and 9013-1 Establishing Certain Notice, Case Management and Administrative Procedures (Docket No. 6208) (the "Case Management Order"). The Debtors submit that, under the circumstances, no other or further notice need be given.

**WAIVER OF MEMORANDUM OF LAW**

26. Pursuant to Local Bankruptcy Rule 9013-1(G), and because there are no novel issues of law presented in the Supplemental Objection, the Debtors request that the requirement that all motions be accompanied by a written memorandum of law be waived.

**NO PRIOR RELIEF**

27. No previous request for the relief sought herein has been made to this Court or any other court.



**CONCLUSION**

WHEREFORE, the Debtors request the Court to enter an Order sustaining this Supplemental Objection and granting such other and further relief as the Court deems appropriate.

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Counsel to the Debtors and  
 Debtors in Possession

IN THE UNITED STATES BANKRUPTCY COURT  
 FOR THE EASTERN DISTRICT OF VIRGINIA  
 RICHMOND DIVISION

- - - - - X  
 In re: : Chapter 11  
 :  
 CIRCUIT CITY STORES, INC., : Case No. 08-35653 (KRH)  
et al., :  
 :  
 Debtors. : Jointly Administered  
 - - - - - X

**ORDER SUSTAINING DEBTORS' SUPPLEMENTAL OBJECTION TO  
 CLAIM 1053 OF GRAPHIC COMMUNICATIONS**

THIS MATTER having come before the Court on the  
 Debtors' Supplemental Objection To Claim 1053 Of Graphic  
 Communications (the "Supplemental Objection"); and it  
 appearing that due and proper notice and service of the  
 Supplemental Objection as set forth therein was good and

sufficient and that no other further notice or service of the Supplemental Objection need be given; and the Court having reviewed the Supplemental Objection, Claim No. 1053, a response, if any, and all related documents; and it appearing that the relief requested in the Supplemental Objection is in the best interest of the Debtors, their estates and creditors and other parties-in-interest; and after due deliberation thereon; and the Court finding that good and sufficient cause exists for the granting of the relief as set forth herein,

**IT IS HEREBY ORDERED ADJUDGED AND DECREED THAT:**

1. The Supplemental Objection is SUSTAINED.
2. Claim No. 1053 filed by Graphic Communications is reclassified in its entirety to a general unsecured non-priority claim for all purposes in these bankruptcy cases.
3. The Debtors' right to object to any claim, including (without limitation) Claim No. 1053, on any ground that governing law permits is not waived and is expressly reserved.

4. The Debtors shall serve a copy of this Order on Graphic Communications on or before seven (7) days from the entry of this Order.

5. This Court shall retain jurisdiction to hear and determine all matters arising from or related to implementation or interpretation of this Order.

Dated: Richmond, Virginia  
\_\_\_\_\_, 2010

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HONORABLE KEVIN R. HUENNEKENS  
UNITED STATES BANKRUPTCY JUDGE

WE ASK FOR THIS:

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Counsel to the Debtors  
and Debtors in Possession

**CERTIFICATION OF ENDORSEMENT UNDER LOCAL RULE 9022-1(C)**

Pursuant to Local Bankruptcy Rule 9022-1(C), I  
hereby certify that the foregoing proposed order has  
been endorsed by or served upon all necessary parties.

/s/ Douglas M. Foley  
Douglas M. Foley